

Practice Governing Formal Adjudicatory Administrative Proceedings Instituted By the Secretary (7 CFR 1.130 *et seq.*), and in the Administrative Procedure Act (5 U.S.C. 551 *et seq.*).

(2) *Evidence of misrepresentation.* Evidence of misrepresentation or misbranding violations includes results of official inspections, audit findings, business records, or other documentation or testimony bearing on the subject. When a lot of fruits and vegetables has been officially inspected, and certification made that the descriptive markings on the container do not misrepresent the produce, but a subsequent inspection reverses the original finding (such as to grade, size, weight, etc.), the shipper/seller will *not* be charged with violation of the Act. However, the misrepresentation must be corrected before the lot is shipped, sold, or offered for resale.

(3) *Warning letters.* When informal settlement of liability is appropriate, violators are given two written warnings and an opportunity to take preventive action before formal action is considered. Warning letters include an explanation of the requirements of the Act and recommendations of actions which the violator can take to avoid future violations.

(4) *Informal sanctions.* Violations subsequent to the sending of the warning letters referred to above, other than flagrant violations, may be settled informally pursuant to paragraph (c)(1) of this section. This procedure permits the violator to resolve the matter by payment of a monetary penalty pursuant to a schedule set out in lieu of a formal proceeding.

(5) *Formal sanctions.* In cases involving repeated or flagrant violations of the Act, formal proceedings seeking the suspension or revocation of the violator's license may be instituted pursuant to the Rules of Practice governing such matters (7 CFR 1.130 *et seq.*). Except in cases of willfulness or where the public health, interest, or safety requires otherwise, a violator must be given written warning and opportunity to demonstrate or achieve compliance with the Act before its license can be suspended or revoked (5 U.S.C. 551 *et seq.*). The warning letters referred to above serve this purpose. If formal pro-

ceedings are instituted, the violator is afforded an oral hearing, if requested, before an Administrative Law Judge, an opportunity to appeal an adverse decision to the Department's Judicial Officer, and a further opportunity to appeal an adverse final decision to the appropriate United States Circuit Court of Appeals.

(6) *Use of record of misrepresentation.* A cumulative record of misrepresentation is maintained. It is used as a basis for determining whether a warning letter should be considered, and, if so, the amount of monetary penalty which is appropriate, or whether there is cause for instituting a formal disciplinary proceeding seeking suspension or revocation of the violator's license. But after payment of a monetary penalty or after two years from the date of the last violation, no formal disciplinary use can be made of the previous record of violation. The record of misrepresentation shall be erased if there are no further violations in the twenty-four (24) month period immediately following the most recent violation, or after 36 months from the date of each individual violation unless it is involved in formal disciplinary proceedings.

[43 FR 4964, Feb. 7, 1978, as amended at 46 FR 22746, Apr. 21, 1981; 47 FR 21234, May 18, 1982; 62 FR 15088, Mar. 31, 1997]

STATUTORY TRUST

§ 46.46 Statutory trust.

(a) *Definitions.* (1) "Received" means the time when the buyer, receiver, or agent gains ownership, control, or possession of the perishable agricultural commodities: *Provided*, That when perishable agricultural commodities have not been received as described above, and where there is a rejection without reasonable cause as provided in § 46.2(bb) and (cc), the goods will be considered to have been received when proffered.

(2) "Dissipation" means any act or failure to act which could result in the diversion of trust assets or which could prejudice or impair the ability of unpaid suppliers, sellers, or agents to recover money owed in connection with produce transactions.

(3) “Default” means the failure to pay promptly money owed in connection with transactions in perishable agricultural commodities; *i.e.*, within the period of time applicable to the type of transaction as established by the provisions of the regulations (§46.2(aa)), or as otherwise agreed upon by the parties.

(4) “Calendar days” as used in section 5(c) 3 of the Act means every day of the week, including Saturdays, Sundays, and holidays, except that if the thirtieth calendar day falls on a Saturday, Sunday, or holiday, the final day with respect to the time for filing a written notice of intent to preserve the benefit of the trust shall be the next day upon which there is postal delivery service.

(5) “Ordinary and usual billing or invoice statements” as used in section 5(c)(4) of the Act, and “invoice or other billing statement” as used in §46.46(f)(3), mean communications customarily used between parties to a transaction in perishable agricultural commodities in whatever form, documentary or electronic, for billing or invoicing purposes.

(b) *Trust assets.* The trust is made up of perishable agricultural commodities received in all transactions, all inventories of food or other products derived from such perishable agricultural commodities, and all receivables or proceeds from the sale of such commodities and food or products derived therefrom. Trust assets are to be preserved as a nonsegregated “floating” trust. Commingling of trust assets is contemplated.

(c) *Trust benefits.* (1) When a seller, supplier or agent who has met the eligibility requirements of paragraphs (e) (1) and (2) of this section, transfers ownership, possession, or control of goods to a commission merchant, dealer, or broker, it automatically becomes eligible to participate in the trust. Participants who preserve their rights to benefits in accordance with paragraph (f) of this section remain beneficiaries until they are paid in full.

(2) Any licensee, or person subject to license, who has a fiduciary duty to collect funds resulting from the sale or consignment of produce, and remit such funds to its principal, also has the duty to preserve its principal’s rights

to trust benefits in accordance with paragraph (f) of this section. The responsibility for filing the notice to preserve the principal’s rights is obligatory and cannot be avoided by the agent by means of a contract provision. Persons acting as agents also have the responsibility to negotiate contracts which entitle their principals to the protection of the trust provisions: *Provided*, That a principal may elect to waive its right to trust protection. To be effective, the waiver must be in writing and separate and distinct from any agency contract, must be signed by the principal prior to the time affected transactions occur, must clearly state the principal’s intent to waive its right to become a trust beneficiary on a given transaction, or a series of transactions, and must include the date the agent’s authority to act on the principal’s behalf expires. In the event an agent having a fiduciary duty to collect funds resulting from the sale or consignment of produce and remit such funds to its principal fails to perform the duty of preserving its principal’s rights to trust benefits, it may be held liable to the principal for damages. A principal employing a collect and remit agent must preserve its rights to trust benefits against such agent by filing appropriate notices with the agent.

(d) *Trust maintenance.* (1) Commission merchants, dealers and brokers are required to maintain trust assets in a manner that such assets are freely available to satisfy outstanding obligations to sellers of perishable agricultural commodities. Any act or omission which is inconsistent with this responsibility, including dissipation of trust assets, is unlawful and in violation of section 2 of the Act, (7 U.S.C. 499b).

(2) Agents who sell perishable agricultural commodities on behalf of a principal are required to preserve the principal’s rights as a trust beneficiary as set forth in §46.2(z), (aa) and paragraphs (d), (f), and (g) of this section. Any act or omission which is inconsistent with this responsibility, including failure to give timely notice of intent to preserve trust benefits, is unlawful and in violation of section 2 of the Act, (7 U.S.C. 499b).

(e) *Prompt payment and eligibility for trust benefits.* (1) The times for prompt accounting and prompt payment are set out in § 46.2(z) and (aa). Parties who elect to use different times for payment must reduce their agreement to writing before entering into the transaction and maintain a copy of their agreement in their records, and the times of payment must be disclosed on invoices, accountings, and other documents relating to the transaction.

(2) The maximum time for payment for a shipment to which a seller, supplier, or agent can agree and still qualify for coverage under the trust is 30 days after receipt and acceptance of the commodities as defined in § 46.2(dd) and paragraph (a)(1) of this section.

(3) The trust provisions do not apply to transactions between a cooperative association (as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), and its members.

(4) The amount claimable against the trust by a beneficiary or grower will be the net amount due after allowable deductions of contemplated expenses or advances made in connection with the transaction by the commission merchant, dealer, or broker.

(f) *Filing notice of intent to preserve trust benefits.* (1) Notice of intent to preserve benefits under the trust must be in writing, must include the statement that it is a notice of intent to preserve trust benefits and must include information which establishes for each shipment:

(i) The names and addresses of the trust beneficiary, seller-supplier, commission merchant, or agent and the debtor, as applicable,

(ii) The date of the transaction, commodity, invoice price, and terms of payment (if appropriate),

(iii) The date of receipt of notice that a payment instrument has been dishonored (if appropriate), and

(iv) The amount past due and unpaid.

(2) Timely filing of a notice of intent to preserve benefits under the trust will be considered to have been made if written notice is given to the debtor within 30 calendar days:

(i) After expiration of the time prescribed by which payment must be made pursuant to regulation,

(ii) After expiration of such other time by which payment must be made as the parties have expressly agreed to in writing before entering into the transaction, but not longer than the time prescribed in paragraph (e)(2) of this section, or

(iii) After the time the supplier, seller or agent has received notice that a payment instrument promptly presented for payment has been dishonored. Failures to pay within the time periods set forth in paragraphs (f)(2)(i) and (ii) of this section constitute defaults.

(3) Licensees may choose an alternate method of preserving trust benefits from the requirements described in paragraphs (f) (1) and (2) of this section. Licensees may use their invoice or other billing statement to preserve trust benefits. The alternative method requires that the licensee's invoice or other billing statement, given to the debtor, contain:

(i) The statement: "The perishable agricultural commodities listed on this invoice are sold subject to the statutory trust authorized by section 5(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499e(c)). The seller of these commodities retains a trust claim over these commodities, all inventories of food or other products derived from these commodities, and any receivables or proceeds from the sale of these commodities until full payment is received."; and

(ii) The terms of payment if they differ from prompt payment set out in section 46.2(z) and (aa) of this part, and the parties have expressly agreed to such terms in writing before the affected transactions occur.

(Sec. 1, 46 Stat. 531, as amended; 7 U.S.C. 499a et seq.)

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OMB CONTROL NO.

§ 46.47 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

The information collection requirements contained in this part have been approved by the Office of Management and Budget (OMB) under the provisions